BRB No. 07-0960 BLA

B.M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 08/29/2008
GLAMORGAN COAL CORPORATION	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2002-BLA-05212) of Administrative Law Judge Edward Terhune Miller rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). In his initial Decision and Order, the administrative law judge credited claimant with twenty-three years of coal mine employment and considered whether he had established a change

in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[1] The administrative law judge found that claimant satisfied the latter requirement by establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, benefits were awarded.

Employer appealed to the Board, which vacated the administrative law judge's findings under Sections 718.304 and 725.309, as they were based, in part, upon evidence that predated the most recent denial of benefits and evidence that was not properly admitted under the evidentiary limitations set forth in 20 C.F.R. §725.414. *[B.M.] v. Glamorgan Coal Corp.*, BRB No. 04-0405 BLA (Mar. 23, 2005) (unpub.). The Board also held that the administrative law judge did not properly weigh the evidence relevant to Section 718.304. *Id*. The Board remanded the case to the administrative law judge for reconsideration.

On remand, the administrative law judge found that claimant established the existence of complicated pneumoconiosis under Section 718.304 and was entitled, therefore, to the irrebuttable presumption of total disability due to pneumoconiosis. The administrative law judge further found that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309 and that his complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits. Employer argues on appeal that the administrative law judge erred in determining that claimant established that he

[1] Claimant filed a claim with the Social Security Administration (SSA) on February 6, 1973. Director's Exhibit 1. After several denials by SSA, this claim was finally denied by the Department of Labor (DOL) on December 11, 1979. *Id*. Claimant filed a second claim on December 31, 1981, which was denied by DOL on February 10, 1983. Director's Exhibit 2. Claimant filed a third application for benefits on June 20, 1986. Director's Exhibit 3. Administrative Law Judge Paul H. Teitler issued a Decision and Order on June 16, 1992, in which he denied benefits because claimant failed to establish the existence of pneumoconiosis. *Id*. The Board affirmed Judge Teitler's denial of benefits on the merits. *[B.M.] v. Glamorgan Coal Corp.*, BRB No. 92-2026 BLA (Aug. 26, 1993)(unpub.). The Board also denied claimant's subsequent request for reconsideration. *[B.M.] v. Glamorgan Coal Corp.*, BRB No. 92-2026 BLA (Jan. 25, 1996) (unpub. Order). Claimant then filed a request for modification on November 19, 1996. *Id*. Administrative Law Judge Richard A. Morgan issued a Decision and Order on January 29, 1999, in which he denied benefits on the ground that claimant failed to establish total disability and total disability due to pneumoconiosis. Director's Exhibit 3. The Board affirmed the denial of benefits in a Decision and Order dated February 25, 2000. *[B.M.] v. Glamorgan Coal Co.*, BRB No. 99-0485 BLA (Feb. 25, 2000) (unpub.). Claimant filed a fourth claim on March 1, 2001. Director's Exhibit 5.

developed complicated pneumoconiosis subsequent to the 1999 denial of his third claim for benefits. Claimant has responded, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

When addressing claimant's 2002 subsequent claim at Section 725.309 on remand, the administrative law judge was required to determine whether "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *see White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In the present case, the prior denial was based upon Administrative Law Judge Richard A. Morgan's determination that claimant failed to establish total disability by a preponderance of the evidence under Section 718.204(b)(2) or by invocation of the irrebuttable presumption at Section 718.304. Consequently, claimant had to submit new evidence establishing total disability pursuant to 20 C.F.R. §718.204(b)(2) or invocation of the irrebuttable presumption under Section 718.304 to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

Employer argues on appeal that because Judge Morgan determined in the denial of claimant's most recent prior claim that claimant had a lesion satisfying the size requirements set forth in Section 718.304(a), evidence which now proves that same lesion constitutes complicated pneumoconiosis does not establish a change in an applicable condition of entitlement but a mistake in a determination of fact. We reject this allegation of error. A review of Judge Morgan's 1999 Decision and Order Denying Benefits reveals that Judge Morgan credited the opinions in which the physicians determined that the x-rays and lung biopsy material contained no evidence of a large lesion or mass. 1999 Decision and Order at 19. With respect to the CT scan evidence, Judge Morgan determined that Drs. Robinette, Fishman, and Wheeler acknowledged the

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 1, 3.

presence of a mass, but disagreed as to whether it represented complicated pneumoconiosis or another disease process. Judge Morgan resolved the conflict in this evidence by according greater weight to the opinions of Drs. Fishman and Wheeler based upon their qualifications. *Id.* Contrary to employer's allegation, however, Judge Morgan did not render a definitive finding that the CT scan evidence established the presence of a lesion that met the size requirements set forth in Section 718.304(a). Thus, the administrative law judge's determination on remand that the newly submitted evidence was sufficient to establish that claimant is suffering from complicated pneumoconiosis as defined in Section 718.304 provided the appropriate basis for his additional finding that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309. *See White*, 23 BLR at 1-3.

Employer also argues that because Dr. Robinette first diagnosed complicated pneumoconiosis in 1998, the administrative law judge erred in relying upon the newly submitted opinion in which Dr. Robinette rendered the same diagnosis to find a change in an applicable condition of entitlement under Section 725.309. Employer further maintains that the administrative law judge erred in determining that the opinion of Dr. DePonte corroborates Dr. Robinette's diagnosis and supports a finding of a change in an applicable condition of entitlement. These contentions are without merit.

The comments to the amended version of Section 725.309 indicate that after reviewing the initial set of responses to the notice of proposed rulemaking:

> The Department [of Labor] … substituted a threshold test which allowed the miner to litigate his entitlement to benefits *without regard to any previous findings* by producing new evidence that established any of the elements of entitlement previously resolved against him. The Department explained that this test effectuated the Fourth Circuit's decision in *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 763 (1997), by *accepting the correctness of the earlier denial of benefits*.

65 Fed. Reg. 79968 (Dec. 20, 2000) (emphasis supplied). Under this standard, Judge Morgan's determination, in 1999, that claimant did not have complicated pneumoconiosis is treated as correct. Thus, the mere fact that Dr. Robinette rendered a diagnosis of complicated pneumoconiosis before the most recent prior denial of benefits was issued did not preclude the administrative law judge from relying upon Dr. Robinette's newly submitted opinion to find that claimant is now suffering from complicated pneumoconiosis. The administrative law judge also rationally determined that this opinion supported a finding of a change in an applicable condition of entitlement under Section 725.309, because it was based, in part, upon information gleaned from Dr. Robinette's treatment of claimant subsequent to the 1999 denial of benefits. *See White*,

23 BLR at 1-3; *see also Rutter*, 86 F.3d at 1362, 20 BLR at 2-235; Decision and Order at 30, 32; Claimant's Exhibit 2.

In addition, the administrative law judge acted within his discretion as fact-finder in determining that Dr. DePonte's opinion, based upon interpretations of an x-ray dated November 27, 2000 and a CT scan obtained on December 14, 2000, corroborated Dr. Robinette's diagnosis and supported a finding that claimant established the existence of complicated pneumoconiosis at Section 718.304. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998); *Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 31-32; Claimant's Exhibits 1, 3. Employer does not contend that this evidence is insufficient to establish complicated pneumoconiosis, but that it is insufficient to establish a change in conditions pursuant to Section 725.309(d), because in the prior claim Judge Morgan "conclu[ded] that the [miner had a] mass, which exceeded five centimeters in 1998, [but the mass] was not complicated pneumoconiosis or a chronic dust disease of the lung arising out of coal mine employment." Brief for Employer at 13. Employer's argument is both legally and factually wrong.

In its first notice of proposed rulemaking, the Department of Labor proposed:

> [The] creat[ion of] a rebuttable presumption that the miner's condition had changed if new evidence established one of the elements of entitlement previously resolved against the miner. An operator could rebut the presumption by establishing that the earlier denial was erroneous, *i.e.*, that the new evidence submitted by the claimant did not demonstrate a change in his condition but simply that the earlier determination was mistaken.

65 Fed. Reg. 79968 (Dec. 20, 2000). But in its second notice of proposed rulemaking, the Department substantially altered its proposal, deleting the rebuttable presumption and indicating that the correctness of the earlier denial of benefits must be accepted. *Id*. The revised version of Section 725.309 embodies, therefore, the Department's determination that the employer cannot go behind the legal conclusion in the prior claim (*i.e.*, that the claimant failed to establish a particular element of entitlement) to analyze the underlying evidence and argue that because it is not qualitatively different from the evidence submitted with the new claim, a finding of a change in conditions is precluded. The Department considered absurd the "commentator's suggestion [] that a party must be bound by a credibility determination that it was unable to overturn on appeal. . . . " 65 Fed. Reg. 79974 (Dec. 20, 2000). The Department made clear that a finding of a change in conditions must be based, at least in part, on evidence obtained since the prior denial, stating that "the factfinder may not award benefits simply by redetermining the credibility of the earlier evidence." *Id*.

In the case at bar, the administrative law judge properly credited the opinions of Drs. DePonte and Robinette regarding claimant's condition subsequent to the denial of benefits in the prior claim. Analysis of Section 725.309, in light of the Department's comments, reveals that employer's contention that the administrative law judge was bound by the credibility determinations made in the prior claim has no merit. Because he properly considered the evidence *de novo,* and found that claimant had established complicated pneumoconiosis which had not been established in the prior claim, the administrative law judge correctly held that claimant had established a change in conditions pursuant to Section 725.309 (d).

Furthermore, employer's contention that claimant cannot show a change in conditions since the prior denial, is premised on factual error. Employer indicates that the prior administrative law judge credited evidence that the miner had a mass exceeding five centimeters. Brief for Employer at 13. The administrative law judge made no such finding. He summarized the doctor's findings, varying from an 8mm by 1mm lesion to a 1.5cm mass, to a 6cm mass, but concluded only that claimant had failed to establish complicated pneumoconiosis. Decision and Order at 19. Thus, employer's argument that claimant failed to establish a change in conditions since the prior claim is factually and legally incorrect.

Lastly, employer asserts that the administrative law judge erred in relying, in part, upon his finding that claimant's simple pneumoconiosis had progressed, to determine that claimant had established the existence of complicated pneumoconiosis and, therefore, a change in an applicable condition of entitlement at Section 725.309. We disagree. The administrative law judge observed that Dr. Hippensteel, who proffered an opinion on employer's behalf, indicated that complicated pneumoconiosis typically appears on x-ray in a background of a high profusion of small opacities. Decision and Order at 32; Employer's Exhibit 19 at 16. The administrative law judge then noted that Dr. DePonte explained in her deposition testimony that claimant's x-rays show an increase in the profusion of small opacities and that Dr. Robinette interpreted the most recent x-ray of record as showing a higher profusion of opacities than Dr. Hippensteel observed on an x-ray he had obtained. *Id.*; Claimant's Exhibits 2, 3 at 27-28. Based upon this evidence, the administrative law judge rationally found that claimant's simple pneumoconiosis has progressed, which, in turn, is supportive of the diagnoses of complicated pneumoconiosis made by Drs. Robinette and DePonte. *Hicks*, 138 F.3d at 535, 21 BLR at 2-340; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Because employer has not raised any meritorious allegations of error regarding the administrative law judge's finding that claimant has established the existence of complicated pneumoconiosis arising out of coal mine employment under Sections 718.203(b) and 718.304, we affirm this finding. We also affirm the administrative law

judge's determination that claimant established a change in an applicable condition of entitlement at Section 725.309.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge